The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: A&E Industries, Inc.; Bay City Marine, Inc.; Campbell Marine Industries; Continental Maritime; Kettenburg Marine; National Steel and Shipbuilding Co.; Southwest Marine, Inc.

File: B-226997; B-226997.2; B-226997.3; B-226997.4 B-226997.5; B-226997.6; B-226997.7

Date: June 19, 1987

DIGEST

1. Provision in solicitation for ship repair services requiring bidders to propose a fixed labor rate for additional work contracting agency may order is not so uncertain as to prevent the preparation of bids in a reasonable manner, even though burden falls on bidders to assess the risk of being asked to perform different types of additional work at different times during contract performance, since contracting agency has included in the IFB all the information it reasonably can regarding its need for additional work, including the total number of additional work hours; definition of labor experience level required; estimates allocating the additional work by general work category; and limits on when the additional work may be ordered.

2. Provision in solicitation for ship repair services requiring bidders to propose a fixed labor rate for additional work contracting agency may order is not inconsistent with the standard Changes clause provision for equitable adjustments for delay and disruption due to changed work, since solicitation specifically advises bidder to include delay and disruption as a cost element of the fixed labor rate.

3. Where solicitation requires bidders to propose a fixed labor rate for additional work contracting agency may order, agency is not required to obtain cost and pricing data or conduct a cost analysis in connection with the labor rate included in each actual order for additional work where the fixed rate is the result of adequate price competition and work orders do not involve "price adjustments" to which requirements for cost analysis apply.

4. Provision in solicitation for ship repair services prohibiting contractor from requiring indemnification as a condition of access by third parties to its facilities and ship under repair is not inconsistent with standard Access to Vessel clause allowing contractor to make "reasonable arrangements" for third party access, since there is no indication in the Access to Vessel clause that indemnification agreements fall within the scope of "reasonable arrangements."

5. Provision in solicitation for ship repair services requiring bidders to propose a fixed labor rate for additional work contracting agency may order and which defines which functions are to be included by bidders in formulating proposed fixed rate does not purport to define how different costs are to be classified for purposes of the bidders' cost accounting systems and therefore does not conflict with Cost Accounting Standards requirements that covered firms use a consistent system for estimating, accumulating and reporting costs.

DECISION

Seven members of the Port of San Diego Ship Repair Association1/ protest certain provisions in invitation for bids (IFB) No. N62791-87-B-0067, issued by the Navy for repair work on the USS Fanning, which require bidders to submit a fixed labor rate for additional work which may be ordered under the IFB. We deny the protest.

The IFB, issued on March 3, 1987, contemplates award of a fixed price contract for specified repair work on the USS Fanning to the lowest priced bidder who, like the protesters, must be a party to the Navy's Master Ship Repair Agreement. Bidders are to submit a fixed price, lump sum bid for the basic work specified in the IFB. The IFB also contains several provisions, recently drafted by the Navy for ship repair contracts, which require bidders to propose a fixed hourly labor rate for a specified number of hours of additional work which the Navy reserves the right to order under the IFB, in this case, a total of 4800 hours of additional work. In evaluating the lowest price for award purposes, the price bid for the 4800 hours of additional work is to be added to the bid for the basic work.

1/ A&E Industries, Inc.; Bay City Marine, Inc.; Campbell Marine Industries; Continental Maritime; Kettenburg Marine; National Steel and Shipbuilding Co.; Southwest Marine, Inc.

Section H-23(b) of the IFB provides that the fixed labor rate for the additional work will apply only to "production functions," defined as "skilled labor at the journeyman level expended in direct production" functions such as welding, carpentry and painting. Attachment J-3 to the IFB provides nonbinding estimates allocating the 4800 hours among eight general work categories such as "miscellaneous hull work (624 hours)" and "miscellaneous main machinery work (1152 hours)." Under section H-23(g), the Navy is limited to ordering no more than 75 percent of the total 4800 hours of additional work during the first half of the performance period; no more than 50 percent during the third quarter; and no more than 30 percent during the fourth quarter. Section H-23(a) provides that the contractor is expected to be able to perform the additional work without causing delay or disruption to any other work under the IFB, and without extending the delivery date of any ship under any other government contract.

The specific number of hours for each actual order for additional work are to be negotiated between the contractor and the Navy; regardless of the type of work ordered, the fixed hourly labor rate bid by the contractor is to apply. If the Navy and the contractor are unable to negotiate a "fair and reasonable price" for specific additional work orders, section H-24 reserves the Navy's right to defer the work; perform the work using government employees; or conduct a separate procurement for the work. In formulating their bids for the basic work, bidders are advised to include as a contingency the cost of supporting third party contractors at the work site if the Navy elects to award a separate contract for additional work. In addition, section H-15 prohibits the contractor from requesting any further indemnification from any party authorized admission to the ship and the contractor's facilities.

According to the Navy, ship repair solicitations such as the IFB at issue here generally contain detailed specifications setting out the basic repair work required. As the basic work progresses, however, the need for additional work often arises. The Navy states, for example, that with regard to certain equipment which cannot be shut down while the ship is in operation, it is unable to determine beforehand precisely what work will be required. Instead, the basic specification generally calls for the contractor to open and inspect the equipment and report on its condition, after which the Navy may determine that additional work on the equipment is necessary. Historically, the Navy's practice has been to negotiate the price for such additional work on a sole-source basis with the incumbent contractor under the basic contract. The Navy states that prices for additional work often have greatly exceeded the government's estimates,

a recurring problem which arises because contractors often buy in on the basic contract and later attempt to recover their initial losses, or "get well", through change order pricing. According to the Navy, the additional work clauses at issue in this case were adopted in an effort to avoid the buy-in/"get well" cycle in ship repair contracts by requiring bidders to commit themselves to a fixed labor rate for a specified amount of additional work.

The protesters challenge the provisions on various grounds, arguing that (1) they are so uncertain as to the amount, type and timing of the additional work as to prevent bidders from preparing their bids on any reasonable, common basis; (2) they are inconsistent with the standard Federal Acquisition Regulation (FAR) clause regarding equitable adjustments for changed work; (3) they improperly establish a fixed amount of profit for all additional work; (4) they are inconsistent with the standard Access to Vessel clause to the extent that they prohibit the contractor from requesting indemnification from third parties performing work for the government at the contractor's facilities; and (5) they may require bidders to calculate the fixed labor rate for additional work in a manner inconsistent with the bidders' established accounting systems. As discussed in detailed below, we find the protesters' arguments to be without merit.

Uncertainty of the additional work

The protesters' principal contention is that the additional work which the Navy reserves the right to order under the IFB is not described in certain enough terms to allow the bidders to reasonably prepare their bids. Specifically, the protesters argue that it is impossible to project the many variables which must be reflected in the fixed rate for additional work--such as the actual labor mix required or the impact of the additional work on performance of the basic work--in any reasonable manner because the IFB does not specify in sufficient detail the type, amount or timing of the additional work. As a result, the protesters argue, it is unreasonable for the Navy to require bidders to commit themselves to a fixed labor rate for the additional work. As explained further below, while the new clauses do indeed impose an additional risk on firms competing for the contract, we do not believe that the protesters have shown that the IFB is defective for lack of detail regarding the additional work which may be ordered.

While a solicitation must be drafted to inform all offerors in clear terms what is required of them, there is no requirement that specifications be drafted in such detail

as to eliminate all risk for the contractor. Newport News Shipbuilding and Dry Dock Co., B-221888, July 2, 1986, 86-2 CPD ¶ 23, aff'd on reconsideration, B-221888.2, Oct. 15, 1986, 86-2 CPD ¶ 428. Here, as discussed above, the IFB specifies the total number of additional work hours which may be ordered; limits the timing of the additional work over the life of the contract; gives estimates by general category of the additional work the Navy expects to order; and specifies the required experience level as "skilled labor at the journeyman level." While more detail on the additional work would be desirable from the bidders' viewpoint to minimize their risk, the Navy maintains that it is impracticable for it to project its needs any more definitely. There is nothing in the record before us to indicate that the Navy's view in this regard is unreasonable. Since the Navy in the IFB has given bidders all the information it reasonably can regarding the additional work which may be required, the Navy properly may call for the bidders to use their business judgment, including their experience with prior ship repair contracts, in setting their prices to reflect the risk of being asked to perform different types of additional work at different times during contract performance. See Klein-Sieb Advertising and Public Relations, Inc., B-200399, Sept. 28, 1981, 81-2 CPD ¶ 251, aff'd on reconsideration, B-200399.2, Feb. 8, 1982, 82-1 CPD ¶ 101.

Further, we see no basis to require the Navy to continue its past practice of negotiating the price of additional work orders on a sole-source basis with the incumbent contractor, as the protesters suggest, rather than calling for a fixed labor rate, simply because the Navy is unable to minimize the bidders' risk by describing the additional work requirements in greater detail in the IFB. On the contrary, in view of the problems the Navy has encountered due to the buy-in/"get well" cycle of pricing in prior ship repair contracts, we cannot say its new approach of requiring bidders to commit to a fixed labor rate is unreasonable; in fact, as the Navy argues, its new approach is consistent with the general requirement that contracting officers take appropriate action to ensure that buying-in losses are not recovered through change order prices by seeking a price commitment covering as much of the agency's requirements as is practical. FAR, 48 C.F.R. § 3.501-2(a) and (b) (1986).

Alleged inconsistency with Changes clause

As the protesters maintain, when changes in the scope of work under the basic contract are ordered, the standard FAR

Changes clause2/ provides for equitable adjustments to the price or completion date to compensate for any delay or disruption caused by the changes. The protesters argue that the additional work clauses in the IFB at issue here are inconsistent with the standard Changes clause because they do not allow for equitable adjustments for any delay or disruption caused by the additional work. We find this argument to be without merit.

Section B of the IFB, in describing the costs which bidders are to factor into their fixed rate for the additional work, specifically states that they are to include "any overtime premium, and delay and disruption dollar costs to accomplish these additional requirements as the contractor's business judgment dictates." Contrary to the protester's contention, compensation for delay and disruption due to additional work thus is specifically to be included as a cost element of the fixed labor rate. Further, to the extent that the protesters argue that the delay and disruption costs are too indefinite to determine before the additional work actually is ordered, as discussed above, in our view the protesters have not shown that it is unreasonable for the Navy, after providing in the IFB all the information it reasonably can, to require the bidders to use their business judgment to assess the likely impact of the additional work on the basic work under the IFB.

Fixed profit limit

The protesters argue that the additional work clauses are inconsistent with the requirements for price negotiation and cost or pricing data analysis in FAR, 48 C.F.R. subparts 15.8 and 15.9, to the extent that they provide for a predetermined amount of profit for all additional work orders without regard to the actual work ordered. Instead of pricing additional work orders based on the fixed labor rate called for by the IFB, the protesters contend that the Navy is required to perform an analysis of the contractor's proposed price, including profit, for each actual order placed for additional work. In our view, the protesters have not shown that the price negotiation and the requirement for cost or pricing data apply to orders placed under the additional work clauses at issue here.

2/ The mandatory Changes clause applicable to job orders under the Master Ship Repair Agreement is set out at Department of Defense (DOD) FAR Supplement, 48 C.F.R. § 252.217-7101 (1985).

The protesters rely on FAR, 48 C.F.R. § 15.804-2(a)(ii), which, consistent with 10 U.S.C. § 2306(f)(1)(B) (Supp. III 1985), requires a contractor to submit cost or pricing data before any contract modification involving a price adjustment expected to exceed $100,000, whether or not such data were initially required. As a preliminary matter, the protesters have made no attempt to show that the additional work orders under the IFB can be expected to exceed $100,000. Even for those orders which do, however, in our view they do not involve "price adjustments" within the meaning of 10 U.S.C. § 2306(f)(1)(B) and FAR, 48 C.F.R. § 15.804-2(a)(ii), so as to require the submission of cost or pricing data and the use of price negotiation as suggested by the protesters. Since the labor rate is fixed as part of the contractor's bid under the basic contract, and is included in the evaluation to determine the low bidder, the only negotiation that occurs in connection with additional work orders concerns the number of workhours required; in fact, the primary purpose of the additional work clauses is to avoid price negotiations for individual orders for additional work.3/ Since the most significant element of the price is to be established pursuant to price competition, and the purpose of cost or pricing data is to place the Government on notice of the basis of a contractor's price to avoid excessive pricing in a noncompetitive situation, we see no reason for requiring the submission or analysis of cost or pricing data here.

In any event, even if the price negotiation procedures were applicable, the FAR provisions regarding profit only prohibit the contracting agency from setting a predetermined limit on profit. See FAR, 48 C.F.R. § 15.901(c). Here, as in any fixed price procurement, the bidders themselves, not the Navy, calculate a profit element which is to be included in their proposed fixed rate for the additional work.

Access to Vessel clause

The Navy's right to authorize access by a third party to the contractor's facilities and the ship while the basic work is being performed derives from the standard Access to Vessel clause applicable to ship repair contracts, set out in the DOD FAR Supplement, 48 C.F.R. § 252.217-7113, which provides in part:

3/ FAR, 48 C.F.R. § 15.804-3(a) and (b), specifically recognizes that cost or pricing data is not required where prices are based on adequate price competition.

"(a) A reasonable number of officers, employees, and associates of the Government, or other prime contractors with the Government, and their subcontractors, shall, as authorized by the Supervisor, have at all reasonable times, admission to the plant, and access to vessel(s) to perform and fulfill their respective obligations to the Government on a noninterference basis. The Contractor shall make reasonable arrangements with the Government or Contractors of the Government, as shall have been identified and authorized by the Supervisor, to be given admission to the Contractor's facilities and access to the vessel(s) and to office space, work areas, storage or shop areas, or other facilities and services, necessary for the performance of their respective responsibilities and reasonable to their performance. All such above personnel shall be required to comply with all Contractor rules and regulations governing personnel at its shipyard, including those relative to safety and security."

As discussed above, under section H-24 of the IFB the Navy reserves the right to have another contractor perform the additional work needed if a fair and reasonable price for the work cannot be negotiated with the contractor performing the basic work. In addition, section H-15 of the IFB prohibits the contractor from requiring indemnification from any third party as a condition of access to its facilities and the ship.

The protesters argue that the section H-15 prohibition on indemnification is inconsistent with the contractor's right under the Access to Vessel clause to control access by third parties; as support for their argument, the protesters rely solely on the language in the Access clause authorizing the contractor to make "reasonable arrangements" for third party access. The Navy disagrees with the protester's interpretation, arguing that section H-15 merely reasserts its existing right under the Access clause to prevent unreasonable denial of third party access through indemnification requirements imposed on the third parties.

In our view, the language of the Access to Vessel clause on which the protesters rely does not clearly show that the prohibition on indemnification in section H-15 conflicts with the contractor's rights under the Access clause; rather, when read in context, it is more reasonable to interpret the language permitting the contractor to make "reasonable arrangements" as relating to the preceding provision in the clause, which allows third party access only on a "noninterference basis", that is, without

unreasonable disruption to the contractor's ongoing work. Since the protesters have offered no support for their more expansive interpretation of that language--which would include indemnification agreements by third parties within the scope of "reasonable arrangements"--we find that they have not shown that section H-15 of the IFB conflicts with the Access to Vessel clause.

Cost Accounting Standards

With regard to calculating the fixed rate for additional work, section H-23(b) of the IFB provides that the rate will be paid only for "production manhours", defined as "hours of skilled labor at the journeyman level expended in direct production" functions such as welding, burning and carpentry. Section H-23(b) further provides:

> "Production manhours will not include those functions (whether charged directly or indirectly by the offeror's accounting system) which are herein defined as support for production functions. Necessary support functions should be priced into the offeror's burdened rate for production manhours using the formula in Section B."

Examples given of "support functions" include testing, engineering and quality assurance.

The protesters argue that these provisions, to the extent that they impose a uniform method to be used by all bidders to formulate the fixed rate for additional work, conflict with the requirement in the Cost Accounting Standards that each bidder use a consistent system for estimating, accumulating and reporting costs. The Navy disagrees, arguing that the only purpose of section H-23(b) is to specify which functions are to comprise the fixed rate in an effort to ensure that all bidders formulate their bids on an equal basis.

We find no support for the protesters' contention that section H-23(b) purports to define the bidders' methods of classifying costs under their cost accounting systems; instead, the provision is intended to ensure that the bidders' calculations of the fixed rate do not differ depending on how costs are classified under each bidder's accounting system. As the Navy states, if the cost elements comprising the fixed rate were not specified in the IFB, the bidders' calculations might differ depending on which functions they assumed would be compensated at the fixed rate and on how different functions were classified in each bidder's accounting system. In our view, the

purpose of section H-23(b) is only to ensure that bids are formulated based on a uniform understanding of the costs comprising the fixed rate; it does not, as the protesters argue, define how different costs should be classified for purposes of the bidders' accounting systems.

The protest is denied.

for Seymour Efros

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